

No. 10430

In the United States  
Circuit Court of Appeals  
For the Ninth Circuit 2

WONG CHIN PUNG, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

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Appellant's Brief

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Upon Appeal from the District Court of the  
United States for the District of Oregon.

HONORABLE CLAUDE MCCOLLOCH, Judge.

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**PRELIMINARY STATEMENT**

Appellant, defendant below, and four other China-  
men were indicted under Section 2553, Title 26 U. S. C.  
A. and Section 174, Title 21 U. S. C. A. on two counts.  
A jury trial was duly waived. Appellant did not testify  
at the trial. At the conclusion of the trial, appellant  
moved the Court for a judgment of dismissal on the  
ground that the government had failed to submit evidence

sustaining the charges in the indictment. Thereafter the Court found appellant guilty under count two only, of assisting in concealment of smoking opium, to which finding the appellant duly excepted. (Record 17).

There is only one point in the case—does the evidence justify a conviction of the appellant?

## JURISDICTION

1. The indictment being under Section 2553, Title 26 U. S. C. A. and Section 174, Title 21 U. S. C. A. (Record 2, 3, 4) the United States District Court for the District of Oregon had original jurisdiction under Sec. 41, Title 28 U. S. C. A. (sub 2) as the indictment charged a crime cognizable under the authority of the United States.

2. (a) This Court has appellate jurisdiction over the District Court of Oregon under Section 211, Title 28 U. S. C. A. placing the District of Oregon in the Ninth Circuit.

(b) This Court has appellate jurisdiction over the District Court in a criminal action by reason of Section 225, Title 28 U. S. C. A. which gives this Court such appellate jurisdiction to review by appeal, final decisions in the District Court, except where direct review may be had in the Supreme Court.

## STATEMENT OF FACTS

At 8:00 p. m., January 12, 1943, Federal narcotic agents arrested a Chinaman named Lee in Portland, Oregon. Between that time and midnight they gave him \$50.00 in marked money for the purpose of making a purchase of opium. About midnight he took the agents to a room numbered 10 on the third floor, top story, of a building in said city. The premises contained a kitchen, certain furniture, a desk, and a stove which was burning "red hot." There were Chinese newspapers around the place.

When the agents arrived with Lee, James Wong opened the outer door of the room. There was still an inner door, and that door had a round-hole window. Upon the agents entering they saw the appellant and the other defendants. One of them, Louis Jung, alias Gar Foo, was coming from behind a desk and the appellant was standing near the door.

There were three tables in the room, each with a complete smoking outfit, and the lamps were burning. Opium residue was found in the pipes, some of which were warm. No one was smoking or using opium. One agent (Giordano) went over to a desk near which Jung was standing and pulled out a drawer finding opium and \$90.00 in money. When questioned by the agents all of the de-

endants denied ownership of the opium. The agents could not testify that any one was under the influence of opium. There were several coats on the wall in back of the desk from which drawer was opened. There was also a jacket on the wall which Jung claimed was his. There was a coat hanging on the wall behind the desk, which the appellant was allowed to put on. It matched the pants he was wearing. The marked money which had been given to Lee was found in a drawer and the keys found on Jung's person fitted the lock of this drawer.

Lee had previously told the agents that Jung was the "big boss," but made no reference in any way to the appellant. Jung paid the rental of the premises and they were under his control. He so admitted at the trial. The appellant was not exercising any jurisdiction or control over the premises at any time.

## ASSIGNMENT OF ERROR

### I.

The Court erred in finding and holding Appellant, Wong Chin Pung, guilty under count two of the indictment, for the reason there were no facts or evidence to support or justify the judgment, and the Court therefore erred in sentencing him and in not returning a judgment of acquittal in his favor. (Record 15, 16.)



## ARGUMENT

While in a criminal case the defendant must be found guilty beyond any reasonable doubt, the Supreme Court has determined that the function of this Court is "not for the purpose of weighing conflicting testimony but only to determine whether there was some evidence, competent and substantial, fairly tending to sustain the verdict."

*Abrams vs. United States,*

250 U. S. 616, 619,

40 S. Ct 17, 18,

63 L. Ed. 1173.

This case was recently cited in *McNabb vs. U. S.* 123 F. (2d), 848, 855.

Therefore, as the defendant did not offer any testimony, if the record contains some competent and substantial evidence this Court should affirm. However, it is our contention that there is no such evidence against the appellant. Appellant was found guilty only of assisting in concealment of smoking opium.

### WHAT IS CONCEALMENT?

Concealment is a positive and affirmative wrong.

*Conceal:*

“To hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of.”

Webster's New International Dictionary (2d Ed).

“Conceal has been defined as meaning to cover or keep from sight, to disguise, to dispose of, to fail to disclose, to hide, withdraw or withhold from observation, to prevent the discovery of.”

15 Corpus Juris (2d) Page 792

“To conceal means to hide or withdraw from observation, to prevent the discovery of; to withhold knowledge of.”

*U. S. vs. Bookbinder,*  
281 F. 207, 210.

“To conceal is to hide, secrete, screen or cover.”

*Robinson vs. Commonwealth,*  
268 S. W. 840, 841,  
207 Ky 53, 56.

## WHAT DOES THE EVIDENCE SHOW?

1. *The government informer did not name appellant as being a dealer in opium, but named other defendants.*

Testimony of agent Giordano (record 62).

“he named Wong Suey and Louis Jung” (Gar Foo) “the big bosses.”

2. *Appellant was not smoking opium.*

Testimony of agent Giordano (record 37).

“The Court: Were there people smoking in there?”

A. Not when I entered, your Honor.”

Testimony of agent Giordano (record 71).

“Q. Could you see the man with his lips on the pipe? A. No.

Q. You couldn't see that?

A. No, I could just see the pipe and then I could see the pipe coming from the form of the man towards the lamp.

Q. Then in reality all you did see was the equipment?

A. I didn't say that.

Q. I didn't ask you that. I asked you what you saw. You didn't see the man with his mouth on the pipe smoking it, did you?

A. No, sir.”

Testimony of agent Bangs (record 139).

“Q. After he went in. You are not contending that there had been any smoking between the time that Giordano went in and the time that you went in, are you? A. No.”

3. *Appellant was not under the influence of opium.*

Testimony of agent Giordano (record 56, 57).

“The Court: Did any of these defendants show

signs of being under the influence?—Is that the way you speak of it in the trade?

A. The only way you could tell would be the odor of the opium on their breath, and it was so strong in the room that you couldn't tell by that."

4. *Appellant had no opium in his possession.*

The record shows there was no opium in appellant's possession, and the finding of the trial court of not guilty on count one reaffirms this.

5. *Appellant had no keys, locks, or other symbols of actual or constructive possession over the desk where opium was found, and where the marked money given to the informer was located.*

The keys were found on Jung's (Gar Foo) person. The marked money was found in a drawer in a desk.

Testimony of agent Giordano (record 50).

"A. Yes, sir. There were several keys on Louis Jung's person that Agent Richmond tried one of the keys and found that it fitted the lock that was found in this drawer.

Q. And that was found on whose person? A. On Louis Jung's person.

Q. And is that one that is now in the hands of the witness?

A. These are the keys that were found by Agent Richmond on Louis Jung's person in my presence.

Q. And that is attached now to Exhibit 2, that

you found in the drawer? A. Yes, and it works this lock."

6. *Appellant had no actual or constructive possession of the room and wood pile where opium was found.*

The evidence shows that Jung (Gar Foo) was the tenant of the premises and that he paid the rent.

Testimony of Frank Sue (record 157, 158).

"The Interpreter: His answer is that that man died and Louis Gar Foo brought me some rent money.

Q. When did he bring you rent money?

A. The latter part of December, 1942.

Q. And did Gar Foo owe the money for the portion of the month of January that he used the room?

A. He didn't pay me anything for January.

Q. When was the rent due?

A. He is supposed to pay me in advance every month for the month."

Testimony of same witness (record 159).

"A. The money he paid me for the latter part of December—in the latter part of December is supposed to be for the January rent."

7. *Appellant was at no time exercising control over the room where the opium was found.*

Testimony of agent Giordano (record 75).

“Q. Now, Wong Chin Pung, how was he dressed?

A. He had on—well, pants and a sweater vest.

Q. And his hat on? A. No, sir.

Q. And he was not exercising any jurisdiction over the room, was he? A. No, sir.”

8. *The Appellant did not operate or control the opening or closing of either the outer or inner door.*

From the evidence it does not appear that appellant had anything to do with the operation of the doors.

9. *Appellant made no admissions against interest, or incriminating statements of any nature.*

Testimony of agent Giordano (record 86).

“Q. Did any of them claim ownership of any of this stuff?

A. No, sir.

Q. What did they say?

A. They all denied ownership and claimed they were just up there.”

Statement of Mr. Hedlund, Assistant U. S. Attorney conducting the prosecution (record 117).

“The Court: Do you have admissions from any of these defendants?

Mr. Hedlund: No.”

From the above testimony, it can readily be ob-

served that there is not sufficient evidence to justify a conviction of appellant on the charge of assisting in concealment of opium. There is no evidence to show that the appellant aided and abetted Louis Jung to conceal opium, nor is there any evidence that appellant did any affirmative act to assist said Jung or anybody else, to conceal opium. While we have not found a case identical with the one at bar, we desire to quote from the case of *Eng Jung vs. The United States*, 46 F. (2d) 66, where appellant was charged with possession and concealment of opium as follows:

“(2-4) We think also there is not sufficient evidence to support the verdict of guilty on the first count. The learned court said: ‘There is no evidence, I think, which directly shows that the defendant either had on his person or actually in a room which he occupied, any of the narcotics. The allegation is, as I understand it, on the part of the Government, that he was cognizant of the situation and that he had become interested in the possession of the opium and the utensils which were found in his place.’

If it be conceded that defendant was cognizant as to what was going on among his tenants, he was not charged with cognizance of evil doing. If the court treated the first count merely as a count charging unlawful possession, and nothing more, there was no evidence of unlawful possession, unless possession be presumed from the fact that a landlord living in a house, whose rooms are separately leased to numerous tenants, possesses opium. This is too remote a posses-

sion to constitute a crime, as it is equally consistent with innocence.

The evidence shows that the defendant's apartment was separate and distinct from the rooms occupied by the other Chinamen. The raiders found the defendant's door unlocked, entered his room, and made a thorough search of his apartment. There they found a scale on his desk, customarily used in weighing opium, a lease book, showing payments of rent, and certain other papers. This was the whole case against the defendant. No narcotics of any kind were found in his apartment. There was no evidence that any narcotics were in his possession or under his control. The government sought to draw the conclusion that the opium found in the possession of certain tenants was in the possession of the defendant. Aside from the question of possession in fact, it could not be said that there was even constructive possession. Such possession could not be assumed from the facts shown. If it be granted that the facts shown are sufficient to raise a suspicion against the defendant, verdicts in criminal cases cannot rest on suspicion. The sanction of the law requiring proof of guilt, beyond reasonable doubt, intended for the protection of innocence, must be steadily observed.

Being fully of the opinion that the evidence was not sufficient to support a verdict of guilty on either count of the indictment, the judgment is accordingly reversed."



**CONCLUSION**

It is our belief that this case is clear and easy of solution. We do not think that the government has any competent and substantial evidence tending to connect the appellant in any way with the crime charged in the indictment and we, therefore, believe that the finding of the trial court should be reversed.

Respectfully submitted,

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